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June 19, 2007

(Via email and U.S. Mail)

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Re: Revised Privilege Logs

Dear Counselors:

This letter will serve as Peterson Farms' final Fed. R. Civ. P. 37 (c) demand as to the State's privilege claims on the documents produced at the ODEQ, OSRC, OWRB, OCC and OSE. Peterson Farms has carefully reviewed each of the State's revised privilege logs for these agencies' documents, and expresses the following concerns with those logs:

1. The following entries from the revised agency privilege logs are insufficient because they either do not have a date or the descriptions fail to provide the information necessary to determine whether the privilege or protection asserted is applicable. Peterson demands the State provide either a date or a complete description for the following entries. Include in your description the name of the specific investigation or litigation to which the documents are related and whether that investigation or litigation is current.

- OSE Revised Privilege Log Nos.: 4, 6, 10, 16, 20, 23, 28, 32, 46, 50, 51 and 56;
- OCC Revised Privilege Log Nos.: 11, 13, 14, 15 and 20;
- OWRB Revised Privilege Log Nos.: 6, 10, 18, 20, 23, 24, 25, 26 and 27;
- OWRB Revised Privilege Log Nos.: 5, 18, 29, 39, 40, 44, 47, 66, 81, 87, 89, 90-92, 95, 103, 107, 125, 134, 147, 152 and 160; and
- OSRC Revised Privilege Log Nos.: 74-76.

2. The documents associated with the following entry numbers from the original agency privilege logs were not included on the revised log. Because the documents have been withdrawn from the respective agency's privilege log, the claim of

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privilege or protection originally asserted over those documents has also been withdrawn. Thus, Peterson Farms demands that the following documents be produced immediately:

- a. ODEQ Original Privilege Log Nos: 4, 17, 19, 20, 25-27, 34-35, 42-43, 45-46, 48-59, 61-65, 67-69, 71, 75, 81-82, 84, 92, 95, 108-109, 113-117, 121, 124-128, 131, 133, 138, 145, 148, 150-151, and 155 (a copy of the original privilege log with the withdrawn documents highlighted is attached hereto);
- b. OCC Original Privilege Log Nos: 3, 19, 21-28 (a copy of the original privilege log with the withdrawn documents highlighted is attached hereto);
- c. OWRB Original Privilege Log Nos.: 17, 30-105 (a copy of the original privilege log with the withdrawn documents highlighted is attached hereto); and
- d. Peterson Farms was never provided an original Privilege Log for the OSE documents. If an original Privilege Log for the OSE exists, Peterson Farms demands that it be provided immediately. However, based upon the numbering sequence in the revised OSE Privilege Log, it appears the following documents have been withdrawn and should be produced: 1, 2, 7, 8, 14, 17, 24-26, 33, 36, 39-45, 47-49, 52, 54-55, 57-58 and 62.

3. There are several entries on the revised agency privilege logs where the information has been significantly changed from the original. Please provide justification for the changes to the following privilege log entries:

- a. **OCC Revised Privilege Log Nos. 1 and 2** – the dates on both of these entries have been changed significantly from the original log entry of July 8, 1994 to November 6, 2006. Explain why the dates for these documents were changed.
- b. **OCC Revised Privilege Log Nos. 4 and 5** – the dates on these entries were changed from the original log entry of June 25, 1994 and July 6, 1994 to March 14, 2003 and April 4, 2003, respectively. Explain why these dates were changed on the revised privilege log.
- c. **OCC Revised Privilege Log Nos. 8, 10-20** – on the original log entries, the dates for these entries did not reflect the year in which they were created. The revised privilege log entries now reflect various years. Explain where the information regarding the year the document was created was obtained and why it was not included on the original log entries.
- d. **OWRB Revised Privilege Log No. 3** – On the original log entry, the subject matter was described as “attorney notes” on “investigation” for this item. This item is now described as “attorney notes” on “document production for poultry litigation.” Please explain the reason for this significant change in the subject matter of this document.

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- e. **ODEQ Revised Privilege Log No. 60** – On the original log, the recipients of the memorandum drafted by Mike Broderick regarding Sequoyah Fuels were Dave Smit and Mark Canley. On the revised log, the recipients have been changed to Kelly Burch and Trevor Hammons. Please explain why the recipients have been changed from non-lawyers to lawyers within the Attorney General's office.

4. It is evident that many of the entries on the privilege logs are for documents created prior to the initiation of this lawsuit by the State of Oklahoma. Many of the entries involve the activities of third parties located within the Illinois River Watershed. Thus, I am unclear as to whether it is the State's position that the documents listed on the agencies' revised logs are privileged or protected regardless of whether they are directly related to this litigation, or because they relate to communications from previous investigations, litigations, claims or actions by the ODEQ, OCC, OWRB, OSE or OSRC.

According to your letter dated April 11, 2007, it is the State's position that it is not obligated to disclose to the Defendants whether the communication identified on the privilege log was a part of a pending investigation, claim or action or a closed investigation, claim or action. As you accurately stated in your letter, whether a communication is covered by attorney-client privilege is governed by 12 O.S. § 2502. More specifically, the communications between an agency and its attorney is governed by 12 O.S. § 2502 (D)(7). 12 O.S. § 2502 (D)(7) specifically states that no attorney-client privilege exists for communications between an agency and its attorney unless those communications are a part of a pending investigation, claim or action. Therefore, this statute places an additional burden upon the State to identify whether the subject matter of a communication over which the State is attempting to assert attorney-client privilege is a pending investigation, claim or action. Moreover, the statute requires the State to show in any instance where it is asserting a privilege based upon a pending investigation, claim or action how the disclosure of such information would seriously impair the claim, investigation or litigation. Thus, it is the State's burden to provide this information in its privilege log so that Defendants have sufficient information to assess the claimed privilege.

Furthermore, your claim that under Fed. R. Civ. P. 26 (b)(3) and the 10th Circuit's holding in *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 702 n. 10 (10th Cir. 1998) that the work product doctrine unequivocally extends from previous litigation to subsequent litigation is misguided. The 10th Circuit in *Frontier* held that in order for the work product protection provided in one litigation to apply to subsequent litigation, it must be "closely related" to the active litigation. *See Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 702 n. 10 (10th Cir. 1998). Again, this places the burden upon the State to: (1) identify whether the documents over which the State claims are protected by the attorney-work product doctrine were a part of a prior litigation or prior anticipated litigation or were simply the result of an agency matter; (2)

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provide the name of that specific litigation or anticipated litigation as to each document; and (3) identify whether the litigation is still pending.

Peterson demands that the State provide the following information for each of the revised privilege logs entries identified in the table below: (1) the full and complete name of the investigation, claim or litigation involving the subject matter stated; (2) the dates the investigation, claim or litigation file was opened and the date it was closed which can be identified by either the completion of the investigation, a judgment date or a dismissal date; and (3) where the State is claiming protection under the work product doctrine, identify whether the State is claiming that the investigation, claim or litigation involving the subject matter is closely related to this litigation. Absent this information, Peterson Farms cannot adequately determine whether the privilege or protection claimed by the State has a reasonable basis in law.

Agency	Revised Log Entry No.
OCC	1-2, 4-6, 8, 10-13, 15-16, 18
OWRB	6, 9-10, 12, 21-27
OSE	3-6, 9-13, 15-23, 27, 29-32, 34, 37-38, 46, 50-51, 53, 56, 59-60
OSRC	1-79, 83-96
ODEQ	1-3, 5, 7, 9-16, 18, 21-24, 28-29, 31, 33, 36-41, 44, 47-48, 60, 66, 70, 72, 74-75, 77, 78, 79, 81, 84-92, 94-95, 97-98, 100-109, 112-114, 120-122, 124-125, 131-132, 134, 136-139, 142-147, 149-150, 152, 155-157, 159-160

Additionally, it appears the numbering sequence is off on the ODEQ Revised Privilege Log from the original ODEQ Privilege Log. Beginning at entry no. 74 on the revised log, the revised log is off by one digit until entry no. 100. At that point, the numbering then becomes two digits off from the entry number on the original log. Moreover, beginning at entry no. 142 on the revised log until entry no. 157, the numbers are off by three digits from the original log. Thus, entries no. 74 through 98 on the revised log are the same as entries no. 73 through 97, respectively, on the original log; entries no. 100 through 139 are the same as entries 98 through 137, respectively, on the original log; and then, entries no. 142 through 157 are the same as entries 139 through 154, respectively, on the original log. Lastly, there are two entries on the original log numbered 154, and entry no. 160 on the revised privilege log is the same as entry no. 155 on the original log. In order to accurately evaluate the State's claims for privilege over these documents on the revised log and compare them to the entries on the original log, the entry numbers need to be the same. Please amend the ODEQ Revised Privilege Log to accurately reflect the entry numbers as they were identified on the original log.

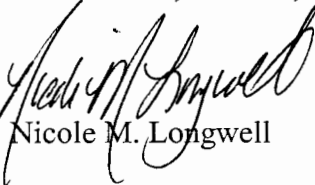
Due to the length of time the State has had to amend the privilege logs and the fact that most of the substantive issues raised in this letter regarding the identification of whether the communication is the result of a pending investigation, litigation, claim or action have been previously discussed in detail with the State, Peterson demands that the information sought in this letter be provided to it either by letter, revised privilege logs or both no later than Monday June 25, 2007. If the State fails or refuses to provide the

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information requested, Peterson Farms will file a Motion to Compel with the Court seeking its assistance in the resolution of these very important matters.

Please feel free to contact me to discuss this very important matter. However, Peterson Farms is not interested in waiting an additional two weeks to a month to receive revised privilege logs.

Best regards,
McDANIEL, HIXON, LONGWELL & ACORD, PLLC



Nicole M. Longwell

Enclosures

cc: A. Scott McDaniel
Defense counsel (*via email only*)